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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

SAN DIEGO GAS & ELECTRIC CO.,

Appellant,

v.

CITY OF SAN DIEGO, *et al.*,

Appellees.

BRIEF OF *AMICUS CURIAE*, THE WASHINGTON LEGAL FOUNDATION

DANIEL J. POPEO
PAUL D. KAMENAR
1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240

Attorneys for Amicus Curiae
WASHINGTON LEGAL FOUNDATION

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INTERESTS OF *AMICUS CURIAE*, WASHINGTON LEGAL FOUNDATION, INC.

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 80,000 members, contributors and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. WLF has appeared in this Court on many occasions as *amicus curiae.* Briefs *amicus curiae* by the Foundation have been filed with and accepted by the United States Supreme Court in the following recent cases: *Williams v. Zbaraz,* ___ U.S. ___, 48 U.S.L.W. 1957 (1980); *Consolidated Edison Co. of New York v. Public Service Commission of State of New York,* ___ U.S. ___, 48 U.S.L.W. 4776 (1980); *United Steelworkers v. Weber,* 443 U.S. 193 (1979); *Carbon Fuel Co. v. United Mine Workers,* 442 U.S. 939 (1979); *Personnel Administrator of Mass. v. Feeney,* 442 U.S. 256 (1979); *Parklane Hosiery Co. v. Shore,* 439 U.S. 322 (1979); *FCC v. WNCN Listeners Guild,* Nos. 79-824, 79-825, 79-826, 79-827 (U.S., filed Nov. 26, 1979); and *FTC v. Standard Oil Company of California,* No. 79-900 (U.S., filed Dec. 10, 1979).

WLF seeks to advance the interests, not only of appellant, but also of all companies and individuals whose property values have been destroyed by governmental takings disguised as changes in zoning regulations and who have not received just compensation. WLF therefore finds that supporting the appellant in the instant case is within the public interest.

The Washington Legal Foundation can bring to this case a perspective not presently represented which may assist in obtaining full consideration of public interest issues. The present parties in this case are primarily concerned with the end results of this lawsuit. None of the litigating parties is primarily focusing upon the broader question of whether, in situations where governmental zoning changes virtually destroy the worth of affected property, their owners may sue in state courts

in inverse condemnation actions to obtain restitution. WLF's sole concern in this case is to support the right of property owners to use inverse condemnation lawsuits to protect their constitutional rights of just compensation for governmental takings, regardless of their ostensible form. The decision by the Supreme Court of California in the instant case demonstrates a permissive attitude toward excessive and arbitrary zoning regulations through its prohibition of the only viable remedy to landholders, *i.e.*, inverse condemnation actions. A decision by the United States Supreme Court reversing the California court is sought to protect fundamental property rights.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* hereby adopts by reference the statement of the facts in the appellant's Jurisdictional Statement ("Jurisdictional Statement") at 6-12.

SUMMARY OF ARGUMENT

Government zoning regulations are one aspect of the power of local communities to police or monitor their economic development. Decisions by communities to amend their zoning regulations are generally upheld by federal courts. However, arbitrary and unreasonable zoning decisions which result in a virtual destruction in the value of private property are considered to be unconstitutional takings by governments. The Fifth and Fourteenth Amendments to the United States Constitution require just compensation for the value of private lands appropriated for public use. Under the circumstances of this case, San Diego Gas & Electric has suffered an unconstitutional taking of its property by the City of San Diego. The downzoning of the utility's

industrial land to open space, as part of a San Diego plan to select sites as open spaces, has destroyed its present value; thus requiring just compensation.

An action in inverse condemnation may be maintained in state courts to obtain compensation for unlawful governmental takings. The Supreme Court of California has recently ruled that the only remedies available to parties aggrieved by unconstitutional takings are actions for mandamus and declaratory injunction. These offer inadequate relief to landowners as litigation may last years without resulting in just compensation for the damages caused by the taking. The Constitution's requirements for just compensation are met through the payment of damages in an inverse condemnation action by the property owner. Constitutional standards concerning compensation should not be lowered because property rights, not individual rights, are at issue in this case. Fundamental property rights of just compensation deserve protection by this Court.

ARGUMENT

I.

A GOVERNMENTAL ZONING REGULATION WHICH DEPRIVES A LANDOWNER OF ALL VALUE OF HIS PROPERTY BECOMES AN UNCONSTITUTIONAL TAKING.

Appellant San Diego Gas & Electric Co. alleges that the City of San Diego, in reclassifying a significant amount of its land from industrial to open space through administrative proceedings, destroyed its value and prevented its commercial use without due process and just compensation as constitutionally mandated. Jurisdictional Statement at 3-4. Pertinent constitutional provisions are the Fourteenth Amendment's due process clause

and the Fifth Amendment's just compensation clause (applicable to the states through the Fourteenth Amendment).[1] The utility claims that the city has engaged in an unconstitutional taking of property.

The United States Supreme Court has examined the issue of when governmental zoning actions constitute an unlawful taking in a number of cases. Zoning decisions may be declared unconstitutional when they are arbitrary and unreasonable. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926). *See Nectow v. City of Cambridge*, 277 U.S. 183, 187-88 (1928). Another factor may be that a zoning regulation deprives a property owner of "economically viable" land. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 138, n.36 (1978). *See Agins v. City of Tiburon*, ___U.S. ___, 48 U.S.L.W. 4700, 4701 (1980). The police power of communities to develop zoning plans is not unlimited in scope.

Justice Holmes noted that a diminution of property values could be a consequence of a zoning regulation. When such diminishing occurs, a court must examine "the extent of the diminution. When it reaches a certain magnitude, in most if not in all cases, there must be an exercise of eminent domain and compensation to sustain

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[1]The Fifth Amendment to the Constitution of the United States provides:

> [N]or shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .

See Comments, 15 San Diego L. Rev. 1211, 1230 (1978).

the act. So the question depends upon the particular facts." *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 413 (1922). *See Goldblatt v. Town of Hempstead,* 369 U.S. 590, 594 (1962).

Amicus urges that under the facts present in the instant case, the actions by the City of San Diego have gone beyond their legitimate police powers concerning zoning classifications and have become artibrary, unreasonable and unconstitutional.

The State of California's legislature has enacted a number of laws requiring California's cities and counties to maintain "open-spaces" within their respective jurisdictions in order to preserve some rural areas from encroaching urban expansion. These open spaces are considered to be either places of great aesthetic value or where necessary for conservation or for maintaining or increasing the value of nearby property. California Government Code §§ 6950-54. *See* Appendix to Appellant's Jurisdictional Statement ("Appendix") at K-2, K-3. The legislature has placed limits on the open-space program. Jurisdictions are warned that open space zoning laws should not be enacted or amended "in a matter which will take or damage private property for public use without the payment of just compensation therefor. This section is not intended to increase or decrease the rights of any owner of property under the Constitution of the State of California or of the United States." California Government Code § 65912. Appendix at K-4.

Federal courts have, in the past, upheld the right of property owners to go to court to obtain compensation for arbitrary and unlawful zoning ordinances. *See Jackson v. Tahoe Regional Planning Agency,* 566 F.2d 1353 (9th Cir.), *aff'd sub nom. Lake Country Estates,*

Inc. v. Tahoe Regional Planning Agency, ___ U.S. ___, 99 S. Ct. 1171 (1979); *Richmond Elks Hall Association v. Richmond Redevelopment Agency*, 561 F.2d 1327 (9th Cir. 1977).

The most recent federal court decision involving governmental takings was *Agins v. City of Tiburon, supra*, decided on June 10, 1980 by the United States Supreme Court. This case concerned a challenge by a landholder and his wife of the open space zoning ordinances of a California city on the grounds of inverse condemnation and unconstitutionality. The ordinances prevented the landowners from building more than five one-family dwellings upon five acres of valuable land which featured a spectacular view of San Francisco Bay.

The Court did not rule on whether the property owners could utilize inverse condemnation as a remedy in the state courts, as it initially upheld the constitutionality of the Tiburon land use plan. 48 U.S.L.W. at 4702. The use of inverse condemnation as a remedy is at issue in this case and will be discussed in the next section of this Argument. This is one reason that *amicus* stresses that the Court should distinguish the case at bar with *Agins v. City of Tiburon*.

In *Agins*, the appellants suffered a significant diminution of the value of their land as their ability to build housing was limited. Yet, they were not deprived of all commercial use by the open space ordinance. Appellant, on the other hand, faces a virtually complete deprivation of commercial use of the approximately 206 acres of land involved in this litigation.

This land at issue was by its nature (*i.e.*, sparsely vegetated, salty and marshy) unsuitable for any use but industrial. In fact, the 1967 General Plan of San Diego had classified all of the property for industrial use. The

land was located in an area of the city where much industrial activity was taking place. It had originally been acquired by San Diego Gas & Electric as a possible site for a power plant before the issuance of the 1967 and subsequent San Diego General Plans. Jurisdictional Statement at G-7.

Under these facts, the decision by the San Diego City Council on June 19, 1973 to designate the 206 acres of undeveloped land as open space was clearly arbitrary and unreasonable. It overturned a previous decision made by the City Council on June 7, 1973, which would have retained most of appellant's land for industrial use, without explanation. Jurisdictional Statement at 9-10.

As a consequence of its zoning decision, the present use of this property is being interferred with by the city. Although the land is vacant, excluding some utility lines, its retention is necessary for use as a site for a proposed power plant. The downzoning of the area to open space destroys its current value as industrial development has become impossible. This interference is an aspect of a governmental taking. *Penn Central Transportation Co. v. City of New York,* 438 U.S. at 136. San Diego's zoning regulations act to prevent the utility from developing its property, not just for a particular purpose, but also for any reasonable commercial development. *See William C. Haas & Co. v. City and County of San Francisco,* 605 F.2d 1117, 1120 (9th Cir. 1979).

The land, due to its natural condition, cannot be realistically expected to be valuable for agricultural or residential use, especially when its owner is a utility company whose *raison d'existence* is to generate electrical power and light.

The reclassification of this land as open space was also inconsistent with the requirements of San Diego's Municipal Code and General Plan concerning designation of open space areas.[2] Appellant's land has no intrinsic value as parkland nor is it particularly historic or scenic in character. Sufficient evidence is lacking as to any value of the property for conservation purposes. In addition, maintaining the property as open land will not act to enhance the value of neighboring properties, as the area the land is situated on contains much industrial activity; activity which would be benefitted more by a new San Diego Gas power plant.

Amicus urges that these facts be considered by the Court in determining whether an unconstitutional taking by San Diego has occurred. If there are any circumstances which demonstrate a taking without compensation by the government, the instant case should be a

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[2]The definition of "open space" in San Diego's General Plan is:

> any urban land or water surface that is essentially open or natural in character, and which has appreciable utility for park and recreation purposes, conservation of land, water or other natural resources or historic or scenic purposes.

San Diego Municipal Code section 61.0601 defines open space as:

> any land or water area: (1) which is primarily in its natural state and has value for park and recreation purposes, and (2) which in the opinion of the City Council of the City, (a) conforms to the criteria established for open space land set forth in the "Progress Guide and General Plan for the City of San Diego" as amended, and (b) would, if retained in its natural state or improved, enhance the present or potential value of abutting or surrounding properties or would maintain or enhance the conservation of natural or scenic resources.

prime example. A decision to overturn the Supreme Court of California will act to strengthen constitutional protections of private property.

Of special note in this case, is that the City of San Diego in 1972 unsuccessfully attempted, through a bond issue election, to raise funds to acquire a number of properties, including appellant's for use as open space. Appendix, Findings of Fact Nos. 9-13 at A-3, A-4. The failure of San Diego's precondemnation scheme provided an incentive for the city to avoid the compensation requirements of eminent domain proceedings. The city has tried to acquire the property of San Diego Gas & Electric in cynical disregard to the purposes of the California laws regarding open space acquisition and the Constitution's mandate for a just compensation.

Appellant San Diego Electric & Gas Company has claimed deprivation of its constitutional rights. The level of constitutional protection should not be lowered by the courts merely because property rights, not individual rights are at issue. Justice Stewart, in an opinion for the Supreme Court, has noted:

> [T]he dichotomy between personal liberties and property rights is a false one. Property does not have rights. People have rights. The right to enjoy property without unlawful deprivation, no less than the right to speak or the right to travel, is in truth, a "personal" right, ... In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other. That rights in property are basic civil rights has long been recognized.

Lynch v. Household Finance Corp., 405 U.S. 538, 552 (1972).

The remaining issue to be examined by *amicus* involves whether a landowner whose property has been unconstitutionally taken by a local government can maintain a cause of action in inverse condemnation.

II.

A PROPERTY OWNER ADVERSELY AFFECTED BY AN UNCONSTITUTIONAL GOVERNMENTAL TAKING SHOULD BE ABLE TO MAINTAIN AN ACTION OF INVERSE CONDEMNATION IN STATE COURT TO RECOVER DAMAGES.

Inverse condemnation is a type of legal proceeding filed by a landowner in a state court against a governmental entity alleging a "taking" of his property without the just compensation required by the Fifth and Fourteenth Amendments of the United States Constitution. The landowner claims that the actions by the government, which have destroyed or diminished the value of his property without legal proceedings occurring, constitutes eminent domain for which compensation is required. This condemnation is considered inverse as the party alleging that a condemnation of land is occurring is not a government but a property owner.[3]

The Supreme Court of California has articulated a new standard for remedies in cases where uncompensated governmental takings have occurred. The court has ruled that no damages for inverse condemnation may be awarded to property owners no matter how outrageous or confiscatory a municipality's taking may be. The only remedies provided are actions for mandamus and declaratory judgment. *Agins v. City of Tiburon*, 24

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[3]Bozung, *Judicially Created Zoning with Compensation: California's Brief Experiment with Inverse Condemnation*, 10 Envt'l L. 67, 70 (1979).

Cal. 3d 266, *aff'd,* 48 U.S.L.W. at 4702; Appendix at G-4. *See* Bozung, *supra* at 98.

These remedies, alone, are insufficient to compensate a property owner for arbitrary and unlawful zoning regulations. It might take years of litigation before a landowner could obtain a favorable ruling from a court which would permit the effective use of his property. Meanwhile, he would have suffered economic injury by his inability to lawfully exploit the full commercial potential of his land. These losses, however significant, would not be reimbursed by the governmental entity which originally violated the law. Threats of mandamus actions alone are clearly insufficient to deter the promulgation of excessively burdensome and arbitrary zoning regulations. In addition, damages which are obtained in an inverse condemnation action, *must* be awarded to injured property owners in order to satisfy the constitutional command for "just compensation" of private property taken for public use.

As Justice Black emphasized:

> [T]he Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.

Armstrong v. United States, 364 U.S. 40, 49 (1960).

Requiring the City of San Diego to compensate San Diego Gas & Electric for the appropriation of its land for open space (as well as for other companies and individuals in circumstances similar to that of the instant case) will cost money. It is understandable that in these times of economic austerity, that municipalities and

other local instrumentalities of government, would wish to limit their expenditures. Yet, "it is obvious that vindication of conceded constitutional rights cannot be made dependent upon any theory that it is less expensive to deny than to afford them." *Watson v. City of Memphis,* 373 U.S. 526, 537 (1963).

Constitutional protection has not been obtained cheaply. At times, all citizens should be prepared to make sacrifices for the common good. A landowner may be prepared to sacrifice enjoyment of his property for some public use but this does not mean that the landowner can expect that the taking by a government of his property would be confiscatory. *Amicus* finds that property owners facing inverse condemnation are entitled to more protection from the law than just the ineffective remedies of mandamus and declaratory judgment.

Amicus agrees with the contentions of appellant that the denial of the inverse condemnation remedy when illegal takings have occurred will act to seriously erode private property rights in California. Jurisdictional Statement at 16-19. The judgment of the California courts, if upheld by this Court, will be a major influence on inverse condemnation suits nationwide. Therefore, it is imperative that the fundamental historical and legal protections of compensation for unlawful takings be maintained by this Court.

CONCLUSION

A property owner, when affected by a change in a zoning regulation which would reduce the economic value of his land to virtually nothing, may claim an unconstitutional taking by a government. If this claim

is upheld by the courts, inverse condemnation (involving just compensation) is a suitable remedy.

Under the circumstances of this case, San Diego Gas & Electric Company has been deprived of its right of just compensation for a zoning change which amounts to a taking of its land by the City of San Diego. *Amicus* submits that it is in the public interest for the rights of American citizens, individuals and businesses alike, to be fairly and adequately compensated by governmental entities. *Amicus* urges the Court to maintain the threatened constitutional protections of just compensation by reversing the Supreme Court of California in this case.

Respectfully submitted,

DANIEL J. POPEO
PAUL D. KAMENAR

Attorneys for Amicus Curiae,
*WASHINGTON LEGAL FOUNDATION**

1612 K Street, N.W.
Suite 605
Washington, D.C. 20006
(202) 857-0240

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*David H. Stonehill, Staff Attorney at the Washington Legal Foundation, assisted in the preparation of this brief.